

provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR-MSRB-95-13 and should be submitted by September 20, 1995.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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[Release No. 34-36145; File No. SR-NASD-93-38]

**Self-Regulatory Organizations; Order Approving Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Interim Injunctive Relief in Intra-Industry Disputes and Certain Other Changes to the NASD Code of Arbitration Procedure**

August 23, 1995.

On August 11, 1995,<sup>1</sup> the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>2</sup> and Rule 19b-4 thereunder.<sup>3</sup> The proposed rule change amends the Code of Arbitration Procedure ("Code")<sup>4</sup> by: (1) amending Sections 22 and 44; and (2) adding a new Section 47 to the Code as a one year pilot program relating to procedures governing applications for interim injunctive relief in intra-

industry disputes under Section 8 of the Code.<sup>5</sup>

Notice of the proposed rule change, together with the substance of the proposal as amended by Amendment No. 1, was provided by issuance of a Commission release (Securities Exchange Act Release No. 34355, July 12, 1994) and publication in the **Federal Register** (59 FR 36465, July 18, 1994). Six comment letters were received.<sup>6</sup> This order approves the proposed rule change.

**I. Introduction**

The rule change approved today is intended to provide a pilot system within the NASD arbitration forum to process requests for temporary injunctive relief. The NASD has indicated that certain NASD member firms have been seeking injunctions in court against registered representatives who move to other firms, presumably to enforce non-competition covenants.<sup>7</sup> The rule change approved today is intended principally to facilitate the disposition of employment disputes and related disputes concerning whether such registered representatives may transfer their accounts to their new firms.<sup>8</sup>

**II. Description of Proposed Rule Change**

**A. Section 22—Peremptory Challenge to Arbitrator Who Handled Request for Injunction**

Section 22<sup>9</sup> has been amended to except proceedings for injunctive orders under new Section 47 from the provision granting a party one peremptory challenge to an arbitrator.

<sup>5</sup> NASD Manual, Code of Arbitration Procedure, Art. II, Sec. (CCH) ¶ 3708.

<sup>6</sup> See Letter from David E. Rosedahl, Managing Director and General Counsel, Piper Jaffray, Inc. ("Piper") to Brandon Becker, Director, Division of Market Regulation, Commission, dated March 31, 1994; Letter from Michael J. McAllister, Esq., Lane & Mittendorf ("Lane") to Jonathan G. Katz, Secretary, Commission, dated July 29, 1994; Letter from John W. Shaw, Esq. and Matthew V. Bartle, Esq., Bryan Cave on behalf of Sutro & Co. to Jonathan G. Katz, Secretary, Commission, dated August 8, 1994 ("Bryan Cave Letter"); Letter from Joel E. Davidson, Senior Vice President and Deputy General Counsel, PaineWebber Incorporated ("PaineWebber") to Jonathan G. Katz, Secretary, Commission, dated August 8, 1994 ("PaineWebber Letter"); Letter from Cliff Palefsky, Esq., National Employment Lawyers Association ("NELA") to Jonathan Katz, Secretary, Commission, dated August 10, 1994; Letter from Walter Baumgardner, Esq. ("Baumgardner") to Jonathan Katz, Secretary, Commission, dated February 17, 1995.

<sup>7</sup> See Letter from Elliott R. Curzon, Assistant General Counsel, NASD to Ethan Corey, Attorney, Division of Market Regulation, SEC (December 16, 1994) (available in Commission's Public Reference Room).

<sup>8</sup> *Id.*

<sup>9</sup> NASD Manual, Code of Arbitration Procedure, Art. III, Sec. 22 (CCH) ¶ 3722.

As discussed further *infra*, the NASD has stated that this provision is intended to ensure that there are no unnecessary delays in processing requests for temporary injunctive relief.

**B. Section 44—Non-refundable Surcharge for Expedited Proceedings**

Section 44 imposes a non-refundable surcharge of \$2,500 on all parties in an expedited proceeding. The rule change provides for expedited proceedings in connection with a request for interim injunctive relief under new Section 47 and as a result of a court granting injunctive relief. The rule change amends Section 44(h) to provide that the total surcharge of \$2,500 is to be paid initially only by the party or parties requesting expedited proceedings.

Under new Section 47(g), an arbitration will proceed in an expedited manner if a court has issued a temporary injunction even if no party has requested expedited proceedings. Accordingly, for purposes of the assessment of fees in Section 44(h), a party will be deemed to have requested expedited proceedings if a court issues a temporary injunction for which it has applied.<sup>10</sup> In addition, the rule change provides that the arbitrator may require a party to reimburse another party for a surcharge it has paid.

**C. Section 47—Procedure for Granting Interim Injunctive Relief**

The introduction to new Section 47 states that arbitrators may grant interim injunctive relief in intra-industry disputes and clarifies the ability of parties to seek temporary injunctive relief in court if they wish. The introduction states that parties may seek either an "interim injunction" or a "permanent injunction" within the arbitration process, that new Section 47 contains the procedure for obtaining an interim injunction, and notes that subsection (g) of new Section 47 describes the effect of court-imposed temporary injunctions on an arbitration proceeding. A party that seeks temporary injunctive relief with respect to an intra-industry dispute must file a claim for permanent relief with respect to the same dispute simultaneously with the Director of Arbitration ("Director"), even if the request for temporary injunctive relief has been made in court.<sup>11</sup> Finally, the introduction clarifies that Section 25(a) governs

<sup>10</sup> See Amendment No. 2, *supra* n. 1.

<sup>11</sup> *Id.*

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> The NASD initially submitted the proposed rule change on July 13, 1993. Amendment No. 1 made technical changes to the text of the rule. See Letter from Suzanne E. Rothwell, Associate General Counsel, NASD, to Selwyn Notelovitz, Branch Chief, Over-the-Counter Regulation, Division of Market Regulation, SEC (February 8, 1994). Amendments Nos. 2 and 3, submitted after publication of notice of the proposed rule change in the **Federal Register**, also were minor clarifying and technical amendments, the text of which may be examined in the Commission's Public Reference Room. See Letter from Elliott R. Curzon, Assistant General Counsel, NASD, to Ethan Corey, Attorney, Over-the-Counter Regulation, Division of Market Regulation, SEC (April 28, 1995) and Letter from Suzanne E. Rothwell, Associate General Counsel, NASD, to Mark P. Barracca, Branch Chief, Over-the-Counter Regulation, Division of Market Regulation, SEC.

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> NASD Manual, Code of Arbitration Procedure, (CCH) ¶¶ 3701 *et seq.*

requests for injunctive relief as part of the final award.<sup>12</sup>

While new Section 47 permits parties to seek temporary injunctive relief in court, Section 6 of the Code<sup>13</sup> provides that "no party shall commence any suit, action or proceeding against any other party touching upon any of the matters referred to arbitration pursuant to this Code." The NASD has stated that it interprets Section 6 to bar only parallel actions in court seeking to litigate the substance of the dispute in arbitration.<sup>14</sup> Given that temporary injunctions do not constitute a final disposition on the merits of a matter, the NASD has stated that Section 6 should not operate to prohibit parties from seeking temporary injunctions in court.

Subsection (a) provides that applications for interim injunctions will be heard by a single arbitrator. Subsection (b) requires the party seeking interim injunctive relief to make a clear showing that it is likely to succeed on the merits, that it will suffer irreparable injury unless the relief is granted, and that the balancing of the equities lies in its favor. The NASD has stated that these standards are intended to mirror those traditionally employed by many courts. Subsection (c) lists the documents that must be filed to apply for interim injunctive relief. A party must file a Statement of Claim, a statement of facts demonstrating the necessity for injunctive relief, and a properly-executed Submission Agreement on the party or parties against whom injunctive relief is sought.

Subsection (d) sets forth the procedure and timetable for handling applications for interim injunctive relief. Under subsection (d)(1), an expedited timetable is provided for handling applications for Immediate Injunctive Orders, which the NASD intends to be analogous to court-issued temporary restraining orders, in that the party against whom an Immediate Injunctive Order is sought is not required to respond to the application. In such cases, the Director must attempt to schedule a hearing within one to three business days after receipt of the application. Information required to be given to parties may be sent by facsimile transmission, and the hearing may be held by telephone or in person in a limited number of cities, at the discretion of the arbitrator or the Director. The NASD has stated that it contemplates holding such hearings in

New York, Chicago and San Francisco. Under the subsection, the arbitrator will attempt to grant or deny the application within one business day after the hearing and record are closed. The duration of an Immediate Injunctive Order will be determined by the arbitrator, but must expire not later than the date of the issuance or denial of a Regular Injunctive Order (if any) or a decision on the merits of the entire controversy.

The NASD has stated that it will act to ensure that Immediate Injunctive Orders do not remain in effect for an extended period of time pending a decision on the merits of the entire controversy.<sup>15</sup> The NASD has stated that it will advise and train arbitrators reviewing applications for Immediate Injunctive Orders that they should consider setting short time limits on the duration of such orders. The NASD also has stated that it will advise parties who have been enjoined that they may seek reconsideration (including termination or limitation) of an Immediate Injunctive Order at any stage of the proceedings and that it will monitor cases in which Immediate Injunctive Orders have been granted to determine whether any party is being disadvantaged unfairly while the order remains in effect.

Subsection (d)(2) establishes procedures and timetables for handling applications for Regular Injunctive Orders, which the NASD intends to be analogous to court-issued preliminary injunctions. This subsection requires the Director to schedule a hearing within three to five business days after the response is filed or due to be filed, whichever is earlier. Failure to file a response will not, however, delay the hearing, and the responding party may choose to present evidence at the hearing whether or not it has previously filed a response. As in subsection (d)(1), hearings may be held by telephone or in selected cities. Regular Injunctive Orders expire as determined by the arbitrator, but not later than the date of a decision on the merits of the underlying controversy.

The NASD has stated that it will advise and train arbitrators reviewing applications for Regular Injunctive Orders that they should consider limiting the duration of an order to remove incentives for the applicant to delay proceedings on the merits of the underlying controversy.<sup>16</sup> The NASD also has stated that it will advise parties who have been enjoined that they may seek reconsideration (including

termination or limitation) of the Regular Injunctive Order at any stage of the proceedings.

New Section 47(e) permits unlimited challenges for cause to the single arbitrator appointed to hear the application for an interim injunction, but prohibits peremptory challenges. Moreover, peremptory challenges may not be made later to an arbitrator who heard an application for an injunctive order and who subsequently is appointed to participate on the arbitration panel hearing the same arbitration on the merits. As noted above, the NASD represents that the elimination of peremptory challenges is intended to promote the expedited nature of temporary injunctive proceedings, while still preserving the parties' rights to challenge an arbitrator for cause.

New Section 47(f) requires the arbitration of the underlying controversy to proceed in an expedited manner according to a timetable and procedures specified by the arbitration panel. This continues the expedited treatment of cases in which interim injunctive relief has been granted, to provide a faster resolution of the merits of the dispute. The Subsection requires the Director to appoint a panel immediately following the issuance of an Immediate Injunctive Order or Regular Injunctive Order.<sup>17</sup> The Subsection also permits the arbitrators to specify procedures and time limitations for actions by the parties different from those specified in the Code.<sup>18</sup> Thus, for example, arbitrators may permit parties to serve requests for information on other parties pursuant to Subsection 32(b)<sup>19</sup> immediately rather than waiting for twenty days to elapse. The NASD represents that this is intended to ensure that parties are able to obtain access to necessary information prior to the hearing on the merits.

New Section 47(g) calls for an arbitration to proceed in an expedited manner if a court has issued a temporary injunction. No request for expedited proceedings is required. Subsection (h) permits the arbitrator to require a party to deposit security in an amount that the arbitrator deems proper for the payment of any costs or damages that might be incurred by the adverse party if it were wrongfully enjoined. Any such deposit shall be held in a separate bank trust or escrow account

<sup>12</sup> NASD Manual, Code of Arbitration Procedure, Art. III, Sec. 25 (CCH) ¶ 3725.

<sup>13</sup> NASD Manual, Code of Arbitration Procedure, Art. I, Sec. 6 (CCH) ¶ 3706.

<sup>14</sup> Amendment No. 3, *supra* n. 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> NASD Manual, Code of Arbitration Procedure, Art. III, Sec. 32(b) (CCH) ¶ 3732.

for the benefit of the party against whom injunctive relief is sought.<sup>20</sup>

Subsection (i) of new Section 47 contains a "sunset" clause under which the pilot program will expire in one year unless the Commission approves any proposed rule change filed by the NASD under Rule 19b-4 to extend the pilot period or to eliminate the expiration date. The NASD has stated that it intends to assess, among other things, whether parties should be restricted to arbitrator-issued interim injunctions during this pilot period. In connection with this review, the NASD has undertaken to provide two reports to the Commission on the usage and operation of new Section 47.<sup>21</sup>

#### *D. Resolution of the Board of Governors*

The rule change amends the Resolution of the Board of Governors<sup>22</sup> to provide that failure to comply with any interim injunctive order issued pursuant to new Section 47 will be added to the types of conduct that may be considered to violate Article III, Section 1 of the Rules of Fair Practice.

### **III. Comments Received**

As noted above, the Commission received six comment letters concerning the rule change. Two commenters supported the rule change.<sup>23</sup> Two commenters did not express support for or opposition to the rule change.<sup>24</sup> Two commenters objected to the rule change.<sup>25</sup>

The Bryan Cave Letter asks whether a temporary injunction is intended to refer to a court-issued temporary restraining order, court-issued preliminary injunction or both. The NASD amended the proposed rule change to clarify that the term "temporary injunction" is intended to encompass both temporary restraining orders and preliminary injunctions issued by courts and interim injunctions issued by arbitrators.<sup>26</sup>

The Bryan Cave Letter also stated that the new Section does not distinguish clearly between legal standards to be applied in issuing an immediate injunction and a regular injunction. The NASD has stated that it expects the parties to present arguments to the arbitrators to permit them to determine appropriate standards for decision. As noted above, the NASD also has represented that it will train arbitrators

hearing applications for interim injunctive relief to ensure that any relief granted does not disadvantage unfairly any party against whom relief is sought.

The Bryan Cave Letter also noted that the NASD intended to hold hearings on immediate injunctive relief in only 3 cities. The Bryan Cave Letter noted that individuals will find it a greater burden to travel for a hearing than will firms. The NASD has represented to the Commission that it will be sensitive to such concerns and will attempt to accommodate parties to the extent possible.<sup>27</sup> In this regard, the NASD has stated that it intends to hold hearings on a telephone basis whenever an in-person hearing would pose an undue burden to a party if the nature of the hearing and the evidence to be presented will permit.

Bryan Cave and PaineWebber noted that Subsections (f) and (g) provide that the arbitration concerning a matter in which either an interim injunction under the section or a court injunction has been issued will be expedited, under a schedule specified by the arbitration panel appointed under the Code. The Bryan Cave Letter and the PaineWebber Letter argued that the NASD should set time parameters for panels as they schedule a hearing on the merits; otherwise, an expedited hearing may not in fact be expedited. As noted above, Section 47 has been amended to require the Director to appoint a panel immediately following the issuance of an Immediate Injunctive Order or Regular Injunctive Order and to permit the arbitrators to specify procedures and time limitations for actions by the parties different from those specified in the Code.

### **IV. Conclusion**

The Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act<sup>28</sup> because the rule change will facilitate the arbitration process in the public interest by codifying authority of arbitrators to grant interim injunctive relief in intra-industry disputes that are subject to NASD arbitration. The Commission believes that it is in the public interest to provide parties with the opportunity to have applications for interim injunctive relief considered in the same forum as hearings on the merits of the dispute.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that File No. SR-NASD-93-38 be, and hereby is, approved on a one-year pilot basis, effective January 3, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

**Margaret H. McFarland,**

*Deputy Secretary.*

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[Release No. 34-36151; File No. SR-NASD-95-15]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to a Statement of Policy To Establish Internal NASD Procedures Delegating to the NASD Staff and the Fixed Income Committee Authority To Review Requests by Members for Exemptions From Rule G-37(b) of the Municipal Securities Rulemaking Board**

August 24, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on August 23, 1995,<sup>1</sup> the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The NASD is proposing to adopt a statement of policy to establish internal NASD procedures delegating to the NASD staff and the Fixed Income Committee the authority to review requests by members for exemptions from Rule G-37 of the Municipal Securities Rulemaking Board ("MSRB"). MSRB Rule G-37<sup>2</sup> prohibits members from engaging in municipal securities business if certain political contributions have been made to municipal issuers.<sup>3</sup> Below is the text of

<sup>1</sup> The NASD initially submitted the proposed rule change on April 15, 1995. Amendment No. 1 deleted all portions of the proposed rule change addressing the ability of NASD members to apply to the Commission for review of any denial by the NASD of a member's request for exemption from Municipal Securities Board Rule G-37. Amendment No. 2 revised the proposed rule change to clarify the types of violations of Rule G-37 for which a member could request exemptions.

<sup>2</sup> MSRB Manual, General Rules, Rule G-37 (CCH) ¶3681.

<sup>3</sup> The proposed statement of policy would establish internal NASD procedures and would not amend the NASD Code of Procedure or other NASD rules.

<sup>20</sup> Amendment No. 3, *supra* n. 1.

<sup>21</sup> *Id.*

<sup>22</sup> NASD Manual, Code of Arbitration Procedure, (CCH) ¶ 3744.

<sup>23</sup> Piper, Lane.

<sup>24</sup> PaineWebber, NELA.

<sup>25</sup> Bryan Cave, Baumgardner.

<sup>26</sup> Amendment No. 2, *supra* n. 1.

<sup>27</sup> Amendment No. 3, *supra* n. 1.

<sup>28</sup> 15 U.S.C. 78o-3.